

GAHC010259702017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5657/2017

SOMESWAR BRAHMA
S/O LT. MONGAL CHANDRA BRAHMA R/O VILL- JONOPRIYA, P.O.
SUBAKHATA DIST. BAKSA, BTAD, ASSAM, PIN - 781372.

VERSUS

THE STATE OF ASSAM and 6 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
EDUCATION ELEMENTARY DEPARTMENT, DISPUR, GUWAHATI - 781006.

2:THE DIRECTOR OF EDUCATION

BODOLAND TERRITORIAL COUNCIL
KOKRAJHAR
ASSAM

3:THE DIRECTOR OF PENSION

ASSAM HOUSEFED COMPLEX
DISPUR
GUWAHATI-6.

4:THE TREASURY OFFICER

MUSHALPUR TREASURY
BAKSA
ASSAM
PIN - 781301.

5:THE DISTRICT ELEMENTARY EDUCATION OFFICER

BASKA

MUSHALPUR
BTC
KOKRAJHAR.

6:THE DEPUTY INSPECTOR OF SCHOOLS

MUSHALPUR
BASKA
ASSAM

7:THE BLOCK ELEMENTARY EDUCATION OFFICER

BASKA
MUSHALPUR
BTAD
ASSAM
PIN - 781301

Advocate for the Petitioner : MR. H. BEZBARUAH

Advocate for the Respondent : MR. B. TALUKDAR
: MRS. R. B. BORA
: MR. S. R. BARUAH
: MR. B. GOGOI

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 14-02-2023

Heard Mr. H. Bezbaruah, the learned counsel appearing on behalf of the petitioner; Mr. B. Talukdar, the learned counsel appearing on behalf of the respondent No.1. I have also heard Mrs. R. B. Bora, the learned Standing counsel appearing on behalf of the respondent Nos. 2, 5, 6 and 7; Mr. S. R. Baruah, the learned Standing counsel appearing on behalf of the respondent No.3 and Mr. B. Gogoi, the learned Standing counsel appearing on behalf of the respondent No.4.

2. The case of the petitioner herein is that the petitioner was initially appointed as an Assistant Teacher of Bengrabari Lower Primary School by the respondent authorities on 01.02.1978. On 25.01.2016, the Block Elementary Education Officer, Baksa, Mushalpur had issued an order informing the petitioner that he will retire from his service on 31.01.2016 as per the records of his Service Book. The petitioner was further directed to hand over the charge to his senior most Assistant Teacher in his school i.e. Bijuli Sonapur Lower Primary School. Accordingly, the petitioner retired from his service w.e.f. 31.01.2016. Subsequent thereto, the District Elementary Education Officer had issued an order dated 28.03.2016 whereby allowing provisional pension to the petitioner of an amount of Rs.17,700/-. It is the further case of the petitioner that he lost his Service Book for which he had filed an application on 30.06.2016 before the respondent authority to take necessary actions for reconstructing his Service Book. The petitioner also submitted a police report along with his application on 30.06.2016. Pursuant to the said communication so submitted by the petitioner, the In-charge of Block Elementary Education Officer, Baksa, Mushalpur had communicated to the District Elementary Education Officer, Baksa for taking necessary action for reconstruction of the Service Book of the petitioner so that his pension case could be finalized at an early date.

3. Thereupon, the Director of Education, Bodoland Territorial Council, Kokrajhar had issued a communication to the District Elementary Education Officer on 21.07.2016 to allow reconstruction of the Service Book in respect of the petitioner. It further appears that subsequent thereto, the Service Book was reconstructed and the In-charge, Deputy Inspector of Schools forwarded the said Service Book along with the pension papers and other relevant particulars of the petitioner for finalization of the pension and DCRG to the Director of

Education, Bodoland Territorial Council, Kokrajhar. Upon the submission on the said pension papers of the petitioner, the Finance and Accounts Officer of the Government of Assam in the Directorate of Pension, Assam upon examining the said papers found a deficiency in the said pension papers. The deficiency so found as mentioned in the communication dated 13.07.2017 by the Finance and Accounts Officer is reproduced hereinbelow.

“1) As per HSLC Certificate No.12436 of 1976 Roll Tihu No.105 his age was 21 yrs 2 months x days on 1/3/76. As such his actual date of birth was 2/1/55, accordingly date of retirement was 31/01/2015. But in the Service Book (reconstructed vide your order No.DE/BTC/Accts-78/Pen/SEC/2007/24 dt 21/07/2016) his date of birth was wrongly recorded as 1/1/1956, and he allowed to go on retirement on 31/01/2016 instead of 31/1/2015. Excess payment comes to Rs.4,83,823/- for the period of”

4. The petitioner thereupon taking into account the said communication dated 13.07.2017 apprehending that the said amount of Rs.4,83,823/- would be deducted from his pension as well as pensionary entitlements has approached this Court by filing the instant writ petition.

5. It appears on record that this Court vide an order dated 15.09.2017 issued notice and directed that the proposed recovery of Rs.4,83,823/- from the pensionary dues should not be made from the petitioner. It further appears that respondent Nos. 2, 5, 6 and 7 have filed their affidavit-in-opposition. Apart from admitting the matters on record which have been stated in the writ petition, it is stated that as per the communication dated 13.07.2017, the Finance and Accounts Officer, Directorate of Pension had returned the Pension case of the petitioner to the Office for meeting the anomaly of date of birth. As per the direction of the Directorate of Pension, the Office of the respondent Nos. 2, 5, 6

and 7 had examined the date of birth of the petitioner. After due examination, it was found that the actual date of birth of the petitioner is 02.01.1955 but the petitioner's date of birth was recorded by the DDO, Block Elementary Education Officer, Baksa as 01.01.1956 in the reconstructed Service Book. It was also mentioned that pursuant to the communication dated 13.07.2017, the amount of Rs.4,48,823/- was found as over paid against the overstayed period and as rule, the petitioner was asked to sign in the undertaking sheet but there was no response from the petitioner. It may be relevant to take note of that a perusal of the entire affidavit-in-opposition filed by the respondent Nos. 2, 5, 6 and 7, there is no allegation that there has been any act of fraud or misrepresentation by the petitioner on account of his overstay.

6. This Court has heard the learned counsels for the parties and also perused the materials on record. The issue which arises for consideration is as to whether there should be any recovery being made from the petitioner of an amount of Rs.4,83,823/- which was found to have been over paid on account of overstay. There is no denial to the fact that the petitioner rendered his service during this period till 31.01.2016. The Supreme Court in the case of **State of Bihar and Others Vs. Pandey Jagdishwar Prasad reported in (2009) 3 SCC 117** observed in paragraph 24 that as there was no allegation of misrepresentation or fraud, which could be attributed to the respondent therein and considering the fact that the appellant authorities have allowed the respondent to work and got works done by him and paid salary, it would be unfair at the stage to deduct the said amount of salary paid to him. Paragraph 24 of the said judgment being relevant is reproduced hereinbelow:

“24. *Considering the fact that there was no allegation of misrepresentation or*

fraud, which could be attributed to the respondent and considering the fact that the appellant had allowed the respondent to work and got works done by him and paid salary, it would be unfair at this stage to deduct the said amount of salary paid to him. Accordingly, we are in agreement with the Division Bench decision that since the respondent was allowed to work and was paid salary for his work during the period of two years after his actual date of retirement without raising any objection whatsoever, no deduction could be made for that period from the retiral dues of the respondent.”

7. It further appears that pursuant thereto, the Supreme Court in the case of ***State of Punjab and Others Vs. Rafiq Masih (White Washer)*** reported in **(2015) 4 SCC 334** had laid down certain parameters as to when recovery sought to be made would be impermissible. Paragraph 18 of the said judgment is quoted hereinbelow.

“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to

discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

8. A perusal of the above quoted judgment of the Supreme Court show that the guidelines more particularly pertaining to paragraph 18(ii) would be applicable to the instant case wherein it has been mentioned that recovery from retired employees or the employees who are due to retire within one year of the order of recovery would be impermissible. In the instant case, the petitioner as already stated hereinabove had retired on 31.01.2016. It further appears that subsequent to the judgment in the case of **Rafiq Masih (supra)**, the Supreme Court in the case of **High Court of Punjab and Haryana and Others Vs. Jagdev Singh reported in (2016) 14 SCC 267** had clarified paragraph 18(ii) of the judgment in the case of **Rafiq Masih (supra)** and observed that the said proposition cannot apply to a situation where the Officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded and in consequence thereof, the Officer furnished an undertaking while opting for the revised pay scale. In the instant case, however the said principles shall not apply taking into account that the petitioner was never put to notice. Subsequent thereto, in the recent judgment of the Supreme Court in the case of **Thomas Daniel Vs. State of Kerala and Others reported in (2022) SCC Online SC 536**, the Supreme Court had further observed that unless there is any allegation of misrepresentation or fraud have been alleged, the question of recovery of the

excess amount so paid cannot be made in view of the judgment in the case of **Rafiq Masih (supra)**. Therefore, the law which have been laid down by the Supreme Court as observed hereinabove would show that in the circumstance, when the incumbent in question by playing fraud or misrepresentation has drawn excess pay either on account of pay fixation or on account of overstay, the principles as laid down by the judgment of the Supreme Court in the case of **Rafiq Masih (supra)**, shall not apply. However, if there is no such allegation of fraud or misrepresentation as in the instant case, the question of recovery of the amount for overstay cannot be made more particularly, in view of the judgment of the Supreme Court in the case of **Pandey Jagdishwar Prasad (supra)** and more particularly in paragraph No.24 as quoted hereinabove.

9. However, it is also relevant to take note of that from a perusal of the HSLC Certificate which has been enclosed to the writ petition as Annexure-10, it is apparent that the age of the petitioner is 21 years 2 months 0 days as on 01.03.1976. As per the calculation thereof, the date of birth of the petitioner would be 01.01.1955 and accordingly, the petitioner ought to have retired on 30.01.2015. Therefore, the pension of the petitioner has to be calculated by taking that his date of birth is 01.01.1955 and his date of retirement is 30.01.2015.

10. In view of the above, the instant petition stands disposed of with the following directions:

(i) The respondent authorities are directed not to recover the amount of Rs.4,83,823/- found to be in excess paid to the petitioner on account of overstay.

(ii) The respondent authorities are further directed to re-compute the pension of the petitioner taking into account that his date of retirement was on 31.01.2015 and not on 31.01.2016.

(iii) The re-computation of the pension of the petitioner shall be done by the respondent authorities as expeditiously as possible and not later than 3 (three) months from the date a certified copy of the order is furnished to the Director of Education, BTC who shall process the papers on the basis of the directions and observations made hereinabove and send it to the Director of Pension and the Director of Pension thereupon shall process the papers and send it to the Office of the Accountant General who in turn shall issue necessary direction to the Treasury Officer so that the petitioner receive his regular pension.

(iv) The said respondent authorities shall complete the entire exercise within a period of 3 months from the date of service of the certified copy of this order to the Director of Education, BTC.

JUDGE

Comparing Assistant